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No. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

PINEHURST AREA REALTY, INC.,
Petitioners,

v.

THE VILLAGE OF PINEHURST.

Petition for a Writ of Certiorari to the Supreme Court of North Carolina

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether North Carolina's nine month statute of limitations bars claims arising under 42 U.S.C. § 1983. The North Carolina Court of Appeals, in its opinion in this matter, held that federal constitutional claims in zoning actions are barred by the nine month statute of limitations established by North Carolina law for zoning actions. (App. pp. 12, 13) The Supreme Court has held, in *Owens v. Okure*, 488 U.S. 235 (1989), "a State's personal injury statute of limitations should be applied to all 42 U.S.C. § 1983 claims." *Id.* at 241. Did the North Carolina Court, by dismissing PAR's claim without reaching the merits, deprive PAR of constitutionally protected rights?

II.

Whether the petitioner, by being barred from relief

by a nine month statute of limitations, was deprived of a constitutionally protected property right to its cause of action where petitioner received no notice of the offending ordinance and whether, under the circumstances of this case, the North Carolina statute of limitations applicable to zoning matters is unconstitutional.

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---

Pinehurst Area Realty, Inc. hereby petitions the Court for a writ of certiorari to the Supreme Court of North Carolina.

OPINIONS BELOW

The opinion of the North Carolina Court of Appeals on petitioner's appeal from dismissal of

petitioner's claims by the trial court and denial of petitioner's motion summary judgment (App. p. 5) is reported at 100 N.C. App. 77, 394 S.E.2d 251 (1990). The *per curium* decision of the North Carolina Supreme Court denying petitioner's petition for appeal by right and for discretionary review (App. p. 1) is not reported at this time. The trial court's orders dismissing petitioner's claims and denying petitioner's motion for summary judgment (App. p. 18) and denying petitioner's motion for reconsideration (App. p. 15) are unpublished.

JURISDICTION

The Supreme Court of North Carolina issued its order dismissing petitioner's appeal and denying its petition for discretionary review on the 10th day of January 1991. (App. p. 1) This petition is, accordingly,

filed within the time allowed by law. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. V provides, in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. XIV provides, in pertinent part:

> [N]or shall any State deprive any person of life, liberty or property, without due process of law. . . .

STATEMENT OF THE CASE

This litigation challenges zoning ordinances purportedly enacted on July 15, 1985 by the Village of

Pinehurst, a municipality and legal subdivision of the State of North Carolina, which substantially effect real property owned and developed by the petitioner, Pinehurst Area Realty, Inc. (hereinafter "PAR"). PAR challenged the zoning ordinances, in its complaint commencing this action filed on March 14, 1988, on the grounds that the Village of Pinehurst had failed to publish notice of any proposed zoning ordinances affecting PAR's property, and that, in fact, the Village had never actually enacted any such ordinance. PAR, in its complaint, raised the federal question at issue by stating that:

> [The Village of Pinehurst's] actions in purportedly classifying PAR's properties with restrictive zoning were taken without regard to the procedures set forth by the North Carolina General Statutes, and as such, violated Plaintiff's right to due process under the United States Constitution and the North Carolina Constitution. [Complaint, ¶ 38, Count I].

The facts giving rise to this action are generally

matters of public record. Pinehurst PAR, a North Carolina corporation engaged in the business of real property development and sales, is the developer of an approximately 92 acre residential development known as Midland Country Club (hereinafter "the country club property"). In addition, PAR owns an approximately 7 acre tract (hereinafter "the office property") adjoining the country club property upon which PAR maintains its place of business and has intended to develop further.

Prior to July 1985, both the country club property and the office property were within the planning and zoning jurisdiction of Moore County. From 1981 to 1984, PAR engaged in a protracted and highly publicized battle to have its country club property zoned RD under Moore County's zoning ordinances; a classification which would allow PAR to develop single and multi-family residences. After successfully obtaining the RD classification, PAR did

in fact develop the country club property into a residential community conducive to the needs of senior citizens. As a part of the development, a golf course was constructed; however, the golf course land was subject to the RD zoning as well and if, at some future date, PAR perceived that the golf course was no longer the desire of the country club's residents, then PAR could develop that land with residential units as well. The office property was zoned by Moore County as B-1, which permitted a wide variety of commercial uses.

On June 3, 1985, the North Carolina General Assembly ratified 1985 Session Law 308 (App. p. 23) and allowed the Village of Pinehurst, under certain conditions, the right to exercise its zoning and planning powers up to two miles beyond their corporate limits. The Act directed that:

> When . . . the Village of Pinehurst . . . annexes any area outside its corporate limits

thus extending the area over which it would be allowed . . . to exercise the powers . . . [of extraterritorial zoning], upon presenting proper evidence to the County Board of Commissioners that such annexation has been accomplished, the County Board of Commissioners shall adopt a resolution authorizing said municipality to exercise these powers within the extended area thus described. *(Id.* at App. pp. 23, 24.)

PAR was actively involved with the process of determining the boundaries of the Village of Pinehurst's extraterritorial jurisdiction; representatives of PAR attended many of the meetings of the "Blue Ribbon Committee", a committee established to determined the most appropriate jurisdictional boundaries for Moore County and the various municipalities involved. Ultimately, the recommendation was made that PAR's properties, both the country club and the office property, were to be in the Village of Pinehurst's zoning jurisdiction. PAR had no objection, although it stated on several occasions that it certainly would object if its hard-fought zoning classifications were altered by the redistricting.

Thereafter, on June 26, 1985 and July 3, 1985, the Village of Pinehurst caused to be published in *The Pilot*, a local newspaper, notices of a public hearing to be held on July 8, 1985 "for the purpose of considering a proposed area for addition to the extraterritorial zoning jurisdiction of the Village of Pinehurst." PAR did not attend this public hearing; it was already aware of the area to be included in the extraterritorial jurisdiction of the Village, and knew that its property was to be included.

On July 15, 1985, the Village Council of the Village of Pinehurst adopted language which it claimed to be an ordinance entitled "An Ordinance Providing for the Extraterritorial Limits of the Village of Pinehurst for Purposes of Planning and Zoning, Building Inspection and Subdivision Regulations." The purported ordinance stated:

> SECTION 1: That the area of extraterritorial limits of the Village of Pinehurst shall be amended and extended as shown and delineated on the map prepared by C.H. Blue and Associates, which map is attached hereto, and correspondingly described in Exhibit "A"attached hereto and dated July 15, 1985.

However, no "Exhibit A" dated July 15, 1985 has ever been found, produced or proven.

Only later, on July 22, 1985, the Board of Commissioners of Moore County, as reflected by their minutes, relinquished extraterritorial zoning jurisdiction to the Village of Pinehurst effective July 22, 1985. (App. p. 25).

Approximately one year later, representatives of PAR happened to see a zoning map which indicated that a substantial portion of the country club property was zoned Public-Conservation and Recreation ("PCR") and the office property was zoned Office-Professional (OP). The PCR zoning classification permits no residential units

whatsoever; it permits only golf courses, riding trails, nature preserves, sewer lift stations, and other non-developed uses. The OP zoning classification permits only limited commercial development such as small professional offices. This was the first time that PAR had any knowledge whatsoever that its properties had been rezoned, or indeed, that rezoning had ever been contemplated for those properties.

Thereafter, PAR undertook to remedy the matter through administrative means. At the recommendation of the Village of Pinehurst, PAR divided its claims into two separate petitions; first, PAR petitioned to have the OP classification rezoned to Neighborhood Commercial "NC". Ultimately, PAR's petition for the NC rezoning was denied. Instead, the Village of Pinehurst created new zoning classifications, NC-1 and NC-2, and contrary to PAR's petition and desire, rezoned the office property to

NC-2. At that point, PAR realized that its administrative efforts would be futile and filed this action in the Superior Court of North Carolina.

Upon the filing of this action, PAR, in its requests for production of documents, requested the map referred to in the purported ordinance adopted July 15, 1985. No map was produced in response to the Request.[1] No map bearing the date July 15, 1985 has been located.

The Village of Pinehurst moved to dismiss PAR's claims; PAR moved for summary judgment against the Village. At the hearing on those motions, PAR again raised the federal constitutional question, arguing that the failure to provide notice was an unconstitutional deprivation of due process and that the application of a nine month statute of limitations to PAR's claims would

[1]After the hearing giving rise to this appeal, a map was provided *ex parte* by the Village to the presiding judge with representations that the map was the one referred to in the July 15, 1985 ordinance. However, the map bears the printed date of July 17, 1985.

unconstitutionally deny PAR of its cause of action thereunder. The trial court dismissed PAR's claims and denied its motion for summary judgment. (App. p. 18) PAR's motion to reconsider yielded the same result. (App. p. 15) Thereafter, PAR appealed to the North Carolina Court of Appeals. PAR raised the federal question the issues presented to the Court of Appeals for review; PAR contended that "the trial court committed reversible error in granting the defendant's motion to dismiss because a nine month statute of limitations is not applicable to these circumstances or, if applicable, is an unconstitutional deprivation of a constitutionally protected right." [Issue I].

On August 7, 1990, the North Carolina Court of Appeals issued a decision affirming the trial court in favor of the Village of Pinehurst. (App. p. 5) The Court of Appeals held that:

> PAR characterizes this action as 'a cause of action for deprivation of constitutional rights' and states that the Unites States Supreme Court in *Wilson v. Garcia*, 471 U.S. 261, 85 L. Ed. 2d 254 (1985), has directed that such actions 'be subject to the relevant state's personal injury statute of limitations' which in North Carolina is three years. . . . We do not find *Wilson* controlling.
>
> . . .
>
> . . . North Carolina Courts have not held that violations of federal constitutional claims in zoning actions extend the usual nine-month statute of limitations.
>
> . . .
>
> We hold plaintiff's challenge to the 1985 zoning law based on alleged state and federal constitutional violations is barred by the nine-month statute of limitations.

(*Id.* at App. pp. 11-13.)

PAR exhausted its rights to have the issues further adjudicated in North Carolina's courts upon the denial by the North Carolina Supreme Court of PAR's petition for discretionary review and dismissal of its appeal of right

"for lack of substantial constitutional question." (App. p. 1)

REASONS FOR GRANTING THE PETITION

ISSUE I. Whether North Carolina's nine month statute of limitations bars claims arising under 42 U.S.C. § 1983. The North Carolina Court of Appeals, in its opinion in this matter, held that federal constitutional claims in zoning actions are barred by the nine month statute of limitations established by North Carolina law for zoning actions. (App. pp. 12, 13) The Supreme Court has held, in *Owens v. Okure*, 488 U.S. 235 (1989), "a State's personal injury statute of limitations should be applied to all 42 U.S.C. § 1983 claims." *Id.* at 241. Did the North Carolina Court, by dismissing PAR's claim without reaching the merits, deprive PAR of

constitutionally protected rights?

In order to ensure uniformity in the application of statutes of limitations, the United States Supreme Court has characterized an action for deprivation of constitutional rights as a claim for personal injury, and therefore has directed that actions arising under such a claim be subject to the relevant state's personal injury statute of limitations. *Wilson v. Garcia*, 471 U.S. 261 (1985). The Court's position in this matter has recently been reinforced in the case of *Owens v. Okure*, 488 U.S. 235 (1989), where the Court held that:

> The Court of Appeals therefore correctly applied New York's 3-year statute of limitations governing the general personal injury actions to respondent Okure's claim. Our decision in *Wilson* promised an end to the confusion over what statute of limitations to apply to § 1983 actions; with today's decision, we hope to fulfill *Wilson's* promise. *Id.*, 488 U.S. at 251. (footnote omitted).

North Carolina's personal injury statute of limitations is a three year statute which accrues from the date the damage

was or should have been apparent. N.C.G.S. 1-52(16). (App. p. 22) The wrongful conduct in the instant action, namely the purported passage of a zoning ordinance affecting PAR's property, was taken in July 15, 1985. The wrongful action was discovered one year later, and this litigation was commenced on March 14, 1988, less than three years from the commission or the discovery of the wrongful act.

The North Carolina Court of Appeal, in its opinion, held that "[w]e do not find *Wilson v. Garcia*, 471 U.S. 261, 85 L. Ed. 2d 252 (1985)] controlling." It further held that "North Carolina Courts have not held that violations of federal constitutional claims in zoning actions extend the usual nine-month statute of limitations." This conclusion of the North Carolina Court of Appeals is squarely contradictory to the clear and unambiguous instructions of the Court in *Wilson*:

> We conclude that the statute [42 U.S.C. § 1983] is fairly construed as a directive to select, in each State, the one most appropriate statute of limitations for all § 1983 claims.

Id. at 275 (emphasis added).

Later, in *Owens*, 488 U.S. 235, this Court clarified the matter so as to "end this 'conflict, confusion and uncertainty,'" *Id.* at 240, and held that "a State's personal injury statute of limitations should be applied to all § 1983 claims." *Id.* at 241. (emphasis added).

Nowhere does this Court exempt zoning cases bearing constitutional claims from the rule set forth in *Wilson* and *Owens*. On the contrary, the Court in *Wilson* recognized and included the wide diversity of cases which arise under 42 U.S.C. § 1983: "A catalog of other constitutional claims that have been alleged under § 1983 would encompass numerous and diverse topics and subtopics." *Wilson*, 471 U.S. at 273. The Court continued:

If the choice of the statute of limitations were to depend upon the particular facts or the precise legal theory of each claim, counsel could almost always argue, with considerable force, that two or more periods of limitations should apply to each § 1983 claim." *Id.* While apparently no court has considered such an exemption or exception for zoning, and therefore, this matter raises an issue of first impression, it has been assumed by commentators that the matter was well settled by the unambiguous language of *Wilson* and *Owens*. *See, e.g.*, Rathkopf & Rathkopf, *The Law of Zoning and Planning* § 46.04[8][a].

The immediate issue before the Court, and one which merits the granting of this Petition, is whether North Carolina courts, by judicial fiat, may create an exception to this Court's directive, thereby eroding the uniformity established by *Wilson* and *Owens*.

A. **PAR's pleadings set forth a cause of action under 42 U.S.C. § 1983 and present facts which clearly go well beyond the "run of the mill [zoning] disputes" which fall outside of that statute's protection.**

Unquestionably, not every zoning dispute rises to the level of a constitutional claim. *See, e.g., Creative Environments, Inc. v. Estabrook*, 680 F.2d 822 (1st Cir.), *cert. den.* 459 U.S. 989 (1982) (holding that the claim in question was "too typical of the run of the mill dispute between a developer and a town planning agency.") Here, however, we have almost an unbelievably egregious set of facts giving rise to a complete deprivation of due process for PAR. The only "process" which was afforded to PAR was the changing of letters on a map by persons unknown and on a map not existing. The municipality had no authority to enact the ordinance it claims to have enacted -- the County and General Assembly of North Carolina

did not delegate power to the Village of Pinehurst to zone that territory until seven days after the ordinance was allegedly adopted. PAR was afforded no notice that its property was subject to consideration for new zoning ordinances. PAR was not afforded the opportunity to be heard. After the purported adoption of the ordinance, PAR, even with the greatest of due diligence, could not have discovered the ordinance -- the map referred to in the text of the ordinance, and the only indication that PAR's property had been rezoned was apparently never filed with the town clerk as required by statute.[2]

Notably, the North Carolina Court of Appeals did not reach the issue of whether PAR presented a cause of

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[2]The Court of Appeals erroneously disregarded PAR's contentions in this regard, holding that "[s]ince this question was not raised during the trial and no information regarding this issue is included in the record, it is not properly before this Court." (App. at p. 10) In fact, the matter was indeed before the Court; the argument was presented on four separate occasions in the Record and was raised, as reflected by the Record of the proceeding, at the hearing before the trial judge, the motion to reconsider, and in a response to supplemental materials provided by the Village.

action invoking the protection of 42 U.S.C. § 1983. By holding merely that North Carolina does not recognize the mandate of the Supreme Court in *Wilson* and *Owens*, and applying the nine month statute of limitations, the Court of Appeals was able to dispose of the case. PAR's pleadings do, however, present a substantial claim under 42 U.S.C. § 1983, and thus, had the Court of Appeals examined this case under the statute of limitations imposed by *Wilson* and *Owens*, it could not have concluded otherwise.

Federal courts have articulated three elements which must be fulfilled in order to establish a justiciable constitutional claim under a Fifth and Fourteenth Amendment "taking" theory. *See Jackson Court Condominiums v. City of New Orleans*, 665 F. Supp. 1235 (E.D. La. 1987). The elements are as follows:

1. The plaintiff must have a constitutionally protected property interest;

2. The governmental mechanism by which plaintiff suffered the deprivation is subject to the strictures of procedural due process; and

3. The plaintiff did not receive the process that was due.

Id. at 1243. In this matter, as is more fully established below, the PAR causes of action allege adequate factual circumstances to establish each of these elements, and therefore, PAR's claims should be considered under the Supreme Court mandated three year statute of limitations.

1. PAR has a Constitutionally Protected Property Interest, Namely Protection From a Wrongful Taking of its Property.

The taking of one's property without due process of law is violative of the Fifth and Fourteenth amendments of the United States Constitution and the analogous provisions of Article I, § 19 of the North Carolina

Constitution. Whether a particular zoning ordinance rises to the level of a taking is a question of fact, particular to the circumstances of each case. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) ("The general rule at least is that property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. . . . [it] is a question of degree -- and cannot be disposed of by general propositions." *Id.* at 43 S. Ct. 160.) Indeed, the appropriate inquiry, which is generally described by courts and literature as "impact review," requires the court to make "an *ad hoc* factual inquiry into two primary factors: 'the economic impact of the regulation, especially the degree of interference with investment-backed expectations and the character of the governmental action.'" Shonkwiler & Morgan, *Land Use Litigation* § 5.01 at pp. 173-74 (1988), *citing Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, (1982), *on*

remand, 58 N.Y.2d 143, 479 N.Y.S.2d 743, 446 N.E.2d 428 (1983). In other words, the factual determination is the familiar balancing test: the rights of a property owner to the enjoyment of legitimate uses of his or her property weighed against the governmental interests in public health, safety, morals or public welfare. *See generally*, Yokely, *Zoning Law and Practice*, § 3-11 (Supp. 1988) and numerous cases therein, including *Euclid v. Ambler Co.*, 272 U.S. 365, 387,; *Fred F. French Investment Co. v. City of New York*, 39 N.Y.2d 587, 350 N.E.2d 381 (1976). "Each case must be determined on its facts." *Helms v. City of Charlotte*, 255 N.C. 647, 122 S.E.2d 817, 820 (1961), *citing* McQuillin, *Municipal Corporations*, vol. 8, § 25.43 at pp. 96-97.

It is axiomatic that an action should not be dismissed for a failure to state a claim upon which relief might be granted where a question of fact exists; namely,

in this case, whether a particular governmental act amounted to a taking. In order to balance the private property rights versus public police powers, the finder of fact must determine what benefits and detriments arise from a given zoning ordinance and whether less drastic measures are available. *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *State v. Joyner*, 386 N.C. 366, 211 S.E.2d 320 (1975). In this instance, a substantial question of fact exists as set forth by the pleadings; PAR alleged in its complaint that its 92 acre "country club" tract was initially zoned and development commenced under the Moore County's "Residential Development" (RD) classification, which permitted development of single and multifamily residential units. Then the Village purportedly changed the zoning without notice or hearing to "Public Conservation and Recreation," a classification which allows no residential development whatsoever, and

permits only golf courses, riding trails, nature preserves, sewer lift stations, and other non-developed uses. Indeed, the circumstances alleged in the pleadings are analogous to those found in the matter of *Fred F. French Investment Co. v. City of New York*, 39 N.Y.2d 587, 350 N.E.2d 381 (1976), where, after a balancing of the facts, the Court there found that a zoning ordinance which purported to create a "Special Park District" which relegated two private parks to restrictions including limiting improvements to "structures incidental to passive recreational use" *Id.*, 350 N.E.2d at 384, was a taking. Likewise, the facts alleged here present an adequate case for further consideration of the constitutional cause of action raised in the pleadings.

2. **The Action Taken by the Village of Pinehurst was Governed by the Strictures of**

Procedural Due Process in that the Purported Zoning in this Instance was not a Legislative Act Because There had been no Delegation of Legislative Power to the Village.

As a second element of determining whether a cause of action rises to the level of a deprivation of constitutional rights for which a remedy exists, PAR's pleadings must establish that the strictures of procedural due process, namely notice and opportunity for a hearing, are indeed required. *Jackson Court Condominiums*, 665 F. Supp. 1235, 1243. Certain governmental actions, namely those which are *legislative*, do not require procedural due process for each person affects:

> Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meetings or in an assembly of the hall. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without
>
> giving them a chance to be heard. Their

> rights are protected the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.

Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441, 36 S. Ct. 141 (1915). Zoning ordinances have been declared to be legislative by North Carolina courts, e.g. *Sherrill v. Town of Wrightsville Beach*, 81 N.C. App 369, 344 S.E.2d 357, 360 (1986), and federal courts, *e.g. Q.C. Construction Co. Inc. v. Gallo*, 649 F. Supp. 1331 (D.R.I. 1986). However, what is essential to the determination in each of these cases, and indeed the entire assumption that zoning is a legislative act, are the policy that citizens affected are not completely deprived of an opportunity to be heard even in the legislative act, i.e., citizens may exercise "their power, immediate or remote, over those who make the rule" and the belief that a "complex society" necessarily requires public actions without notice to all those affected. *Bi-Metallic Investment*

Co., supra.

The instant case, however, is readily distinguishable from those above. First, the pleadings state that PAR's properties were the *only* properties of the entire extraterritorial area considered by the Village on July 15th that received a zoning classification different from that which had been previously applied by Moore County. Thus, the legislative nature of this particular purported zoning ordinance, as opposed to the ordinance establishing extraterritorial bounds, is somewhat less than compelling.

More importantly, however, is the fact that the pleadings state that the Village was acting without delegated legislative authority to enact a zoning ordinance concerning PAR's properties. As set forth above in the Statement of Facts, the Village received the right to acquire extraterritorial zoning areas through 1985 Session Law 308, which amended N.C.G.S. § 160A-360(a), the

latter being the delegating statute enabling municipalities such as the Village to exercise zoning powers. The Session Law required the Village to present a resolution to the Moore County Commissioners, whereupon the County Commissioners were to relinquish zoning authority within such areas. The resolution referred to in the Session Law was prepared by the Village on July 15th, 1985. On July 22, 1985, the resolution was presented to the Moore County Commission, and on that same day, the County Commissioners voted to "relinquish the extraterritorial zoning jurisdiction to the [the Village] . . . *effective July 22, 1985.*" [emphasis added]. The purported zoning ordinance allegedly affecting PAR's property was adopted a week earlier, *on July 15, 1985.*

Thus, the purported zoning ordinance in *this* petition is not a legislative act, and therefore not beyond the "strictures of due process." It is not an act affecting a

number of people, but merely the PAR, and therefore not subject to the policy consideration of impracticability of notice. Moreover, inherent in any legislative action is a proper delegation of authority, for without proper delegation, the citizen is deprived of the power, immediate or remote, over those who make the rule. "A zoning ordinance of a municipality is valid and enforceable *if it emanates from ample grant of power by the Legislature to the city or town.*" *Helms v. City of Charlotte*, 255 N.C. 647, 122 S.E.2d 817, 820 (1961). Here, the pleadings establish that the chain of delegation was broken; the Village acted prior to obtaining authority and hence, if PAR is not afforded due process rights, it is afforded no rights at all.

3. **The Action Taken by the Village of Pinehurst Deprived PAR of its Procedural Due Process Rights in that no Notice or Hearing was**

Afforded PAR.

"It is essential to the validity of a municipal zoning ordinance rezoning realty that notice be given and opportunity for hearing be afforded to those whose rights will be affected by the proposed zoning regulation." Rathkopf & Rathkopf, *The Law of Zoning and Planning*, § 10-10 (Supp. 1987); see also *Sellers v. City of Asheville*, 33 N.C. App. 544, 236 S.E.2d 283 (1977). As the United States Supreme Court has stated, "when notice is a person's due, process which is a mere gesture is not due process. [Instead, notice must be] reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Trust Co.*, 339 U.S. 307 (1950).

N.C.G.S. § 160A-364, the notice statute applicable in July 1985, required a public hearing and notice thereof

prior to the adoption of any zoning ordinance. It appears that the time and method of the Village's notice for simply an extension of extraterritorial jurisdiction may have been adequate--but there was no notice whatsoever of the zoning changes heard during that same meeting affecting PAR's properties. As described above, the only notice (which appeared on two occasions), was a notice declaring that a "hearing for the purpose of considering a proposed area of extraterritorial zoning" was to be held on July 8, 1985.

It is generally held that where a specific proposal is set forth in the notice of hearing, any substantial change therein at, or as a result of, the public hearing requires a new notice to be published and a new hearing, in the absence of which, the legislation will be declared void. Rathkopf & Rathkopf, *supra* at § 10-17. Furthermore, where there are ambiguities in the notice of a proposed

zoning change, such ambiguities should be resolved against the sufficiency of the notice. *Id.* at Supp. p. 79, *City & County of Denver v. Eggert*, 746 P.2d 216 (1982); *Holly Development, Inc. v. Bd. of County Commissioners*, 342 P.2d 216 (1950). This is not to say that the notice must be highly specific as to the purposes of the hearing, but must be clear and unambiguous and readily intelligible to the intended reader, the average citizen at large, who is presumed to lack the technical knowledge of a zoning expert. *North Beach Medical Center, Inc. v. City of Ft. Lauderdale*, 374 So. 2d 1106 (Fla. App. 1979); *Circle M. Construction, Inc. v. Apache Junction*, 701 P.2d 850 (Ariz. App. 1985).

It is clear that the authors of the North Carolina General Statutes consider that the process of acquiring extraterritorial zoning jurisdictions is a separate and distinct function from the process of zoning such newly

acquired jurisdictions. North Carolina G.S. § 160A-360(b) requires that a municipality adopt an ordinance specifying the areas to be included, and further, N.C.G.S. § 160A-364 specifies that a public hearing must be held prior to the adoption of such an ordinance. Thereafter, N.C.G.S. § 160A-360(f) states that "the county [in this case, Moore County] regulations and powers of enforcement *shall remain in effect*" for a period of sixty days or until the municipality [in this case, the Village] adopts its own ordinances, and that during this sixty day period, hearings may be held. Indeed, the Village was instructed by a representative of the North Carolina Natural Resources and Community Development planning department that:

> . . . [just] because the General Assembly grants two mile jurisdiction does not necessarily mean that all three towns would automatically take in the two miles. *First* the municipalities would have to establish an ordinance to extend their jurisdiction and to define the boundary either in an ordinance or on a map. Then the municipality must hold a public hearing before they can take in

> extraterritorial area. Once extraterritorial jurisdiction is taken in, *then they extend zoning and have an additional public hearing.*

The distinction between the acquisition of extraterritorial territories and the zoning thereof, and the requirements of notice specific to each, has recently been recognized by the North Carolina Court of Appeals in the *Raynor v. Raynor and the Town of Garner* case, 379 S.E.2d 880 (N.C. App. 1989), where the Court outlined the statutory provisions for acquiring and zoning such jurisdictions. As the Court there said, "*[o]nce a city or town has placed within its jurisdiction extraterritorial areas*, methods of procedure for zoning are as follows . . . [including notice of proposed zoning to affected landowners]." *Id.* at 882 [emphasis added].

The notice provided by the Village apprised readers of it that the Village was engaged only one of the two steps required to acquire and then zone

extraterritorial jurisdictions. The notice simply said that the Village was "considering a proposed area for addition to the extraterritorial jurisdiction of the Village of Pinehurst." This notice, under any reading, simply does not apprise the reader whose rights might be affected of the nature and character of the action proposed." *Sellers v. City of Asheville*, 33 N.C. App. 544, 549, 236 S.E.2d 283, 286 (1977); *Bryan v. Raynor and the Town of Garner*, 379 S.E.2d 880, 883 (N.C. App. 1989).

Where, as in this case, notice is deficient, and thereby an opportunity for a hearing is denied as well, procedural due process is not afforded. PAR has been denied its constitutionally guaranteed protection under 42 U.S.C. § 1983.

Thus, while perhaps certain zoning disputes are not appropriately remedied under a cause of action for constitutional deprivation, the instant case certainly is.

PAR's pleadings state a cause of action parallel to the requirements of the United States Supreme Court for such actions: PAR pleads a deprivation of a fundamental and protected constitutional right, PAR pleads a process inherently or by default subject to the strictures of due process, and PAR pleads a manifest denial of due process. Under these pleadings, a dismissal for failure to state a cause of action based upon a nine month statute of limitations simply contradicts the clear and unequivocal mandate of the Supreme Court; claims asserting deprivation of constitutional rights are governed by three year statutes of limitations in North Carolina.

ISSUE II. **Whether the petitioner, by being barred from relief by a nine month statute of limitations, was deprived of a constitutionally protected property right to its cause of action where the petitioner received no notice**

of the offending ordinance and whether, under the circumstances of this case, the North Carolina statute of limitations applicable to zoning matters is unconstitutional.

The nine month statute of limitations, as applied to this petitioner, is unconstitutional because it deprives the petitioner of its cause of action, which is a "species of property protected by the Fourteenth Amendment's Due Process Clause. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). In order for a citizen to pursue a cause of action, he must first be aware that his interests have been adversely affected. To the extent that the North Carolina statute of limitations bars claims after nine months, irrespective of whether notice was given or received or reasonably discoverable by the affected party, it cannot be allowed to stand. This, therefore, presents

this Court with an additional ground for granting PAR's petition, and, like the issue raised above, presents the Court with an issue of first impression.

This Court, in *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1987), considered an Oklahoma probate law requiring claims to be presented to the executor of an estate within two months of publication of notice advising creditors of the commencement of probate proceedings. The question presented in that case was whether the provision of notice solely by publication satisfied the Due Process Clause.

The Court in *Pope* summarily reached the conclusion that notice was indeed required in any state action affecting property. "An elementary and fundamental requirement of due process in any proceeding which is to be according finality is notice reasonably calculated, under all the circumstances, to appraise

interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 307, 314 (1950). The Court further concluded, citing *Logan*, *supra*, that a cause of action is indeed a protected property interest which cannot be denied a claimant without due process of law. *Pope*, *supra* at 478.

In the probate process, the notice triggers the time bar. Similarly, in the case at hand, the notice required prior to consideration of a zoning ordinance triggers the beginning of the process which will ultimately result in a brief, nine month period in which, under North Carolina's statute of limitations, an aggrieved party can contest the validity of a zoning ordinance. The probate notice is, according to *Pope*, a state action, and likewise, the notice required of the municipality prior to the enactment of a zoning ordinance is a state action. Under *Pope*, in the

probate process, where notice is not provided in a fashion reasonable under the circumstances, the statute of limitations cannot be invoked to bar the claim of one who was not notified. Similarly, in the case at hand, where notice is defective or otherwise unreasonable under the circumstances, a statute of limitations which bars claims irrespective of whether notice was properly given is contrary to the Constitutional requirements for Due Process.

It is indisputable that the State has a legitimate policy interest in achieving prompt finality in zoning matters. As the Court of Appeals pointed out in its opinion, "there is a strong need for finality with respect to zoning matters so that landowners may use their property without fear of a challenge years after zoning has been

apparently determined."[3] But, as the Court pointed out in *Pope*, so also the State has a legitimate interest in the swift disposition of probate proceedings. However, the provision of actual notice is not inconsistent with the goals and legitimate interests of the State in either the probate context, *Pope*, *id.* at 489, and in the zoning context. The Court has "repeatedly recognized that mail service is an inexpensive and efficient mechanism that is reasonably calculated to provide actual notice." *Id.* at 490.[4]

[3]While this policy is, of course, essential in the context of zoning in general, it is inapplicable as a policy argument in the case at hand. Here, the utter failure of the Village of Pinehurst to observe procedural safeguards with regards to the zoning of PAR's property, including the failure to notify affected property owners, the lack of jurisdiction of the property which was purportedly zoned, and the failure to create a record of the ordinance, is more destructive to the Court of Appeal's stated policy because, under these circumstances, no one can be sure what zoning applies to any property in the Village. The public policy for an orderly and systematic zoning process whereby affected citizens are made aware of the zoning which pertains to their property is more compelling than the Village's interest, in this instance, in attaining quick finality.

[4]Since the purported enactment of the zoning ordinances at issue, the State of North Carolina has enacted a new notice statute which requires actual notice by mail to affected property owners.

Thus, by analogy, the line of thought which led the Court in *Pope* to conclude that, in the context of state actions, a due process cause of action exists where a statute of limitations, triggered by notice, deprives one of a property right if the notice is defective or unreasonable, is equally applicable here. As in *Pope*, the instant case lends itself to the same analysis; the Village cannot hide behind a nine month statute of limitations where, because of its own faulty notice, deprived PAR the right to be heard regarding zoning affecting its property. If the North Carolina statute of limitations is to be so strictly construed as to bar even these egregious facts, then the statute is itself unconstitutional.

CONCLUSIONS

As this Court in *Wilson* held, the rights enforceable under § 1983 include those guaranteed by the Federal

Government in the Fourteenth Amendment: that every person within the United States is entitled . . . to those 'fundamental principles of liberty and justice' that are contained in the Bill of Rights and 'lie at the base of all of our civil and political institutions.' These guarantees of liberty are among the rights possessed by every individual in a civilized society, and not privileges extended to the people by the legislature." 471 U.S. 278. Here, the Village, by its utter inability to abide by procedural safeguards inherent in statutes governing the enactment of zoning regulations, has deprived PAR of its constitutionally protected property interest. Under such circumstances, PAR's rights must be protected by 42 U.S.C. § 1983 and the remedies set forth therein, and indeed, PAR has asserted those rights and remedies at every stage of this litigation. For the North Carolina Court to rule that it, as a policy matter, will disregard the

United Supreme Court in zoning matters is clear error which perpetuates the constitutional deprivations suffered by PAR. Alternatively, a statute of limitations which permits constitutional claims to lapse because of the Village's failure to property notify protected property owners is itself inherently at fault; to the extent that it deprives claimants who recieved no notice, it unconstitutionally deprives such claimants, such as PAR, of their protected cause of action property interest.

For the foregoing reasons, Petitioner urges this Court to issue a writ of certiorari.

Respectfully submitted, this the 10th day of April, 1991.

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APPENDICES

APPENDIX A

SUPREME COURT OF NORTH CAROLINA

TWENTY-A DISTRICT

PINEHURST AREA REALTY, INC.

v.

THE VILLAGE OF PINEHURST

From Moore County
8920SC1101

Opinion No. 461P90

ORDER

Upon consideration of the notice of appeal from the North Carolina Court of Appeals, filed by the Plaintiff in this matter pursuant to G.S. 7A-30, and the motion to dismiss the appeal for lack of substantial constitutional question filed by the Defendant; and upon consideration of the petition for discretionary review of the decision of

the North Carolina Court of Appeals, filed by Plaintiff pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals: the motion to dismiss the appeal is

> "Allowed by order of the Court in conference, this the 10th day of January 1991.
>
> s/ Whichard, J.
> For the Court"

The Petition for Discretionary Review is:

> "Denied by order of the Court in conference, this the 10th day of January 1991.
>
> s/ Whichard, J.
> For the Court"

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 16th day of January 1991.

J. GREGORY WALLACE
Clerk of the Supreme Court
/s/ _____
PEGGY N. BYRD
Assistant Clerk

APPENDIX B

NORTH CAROLINA COURT OF APPEALS

NO. 8920SC1101

PINEHURST AREA REALTY, INC.

v.

THE VILLAGE OF PINEHURST

From Moore County
Number: 88CVS198

Filed January 18, 1991

DENIED

Appeal to review the decision of the Court of Appeals filed on August 7, 1990 was dismissed and Petition for Discretionary Review was denied by order of the Supreme Court of North Carolina in Conference on the 10 day of January, 1991 and same has been certified

to the North Carolina Court of Appeals.

IT IS THEREFORE CERTIFIED to the Clerk of Superior Court Moore County North Carolina that the Supreme Court has dismissed the Appeal and denied the Petition for Discretionary Review in this cause.

Witness my hand and official seal this the 10 day of January, 1991.

/s/ _____
FRANCIS E. DAIL
Clerk of the Court of Appeals

/s/ _____
JEANNE STAKEMAN
Deputy Clerk

APPENDIX C

NORTH CAROLINA COURT OF APPEALS

NO. 8920SC1101

PINEHURST AREA REALTY, INC.,
Plaintiff,

v.

THE VILLAGE OF PINEHURST,
Defendant.

Filed August 7, 1990

AFFIRMED

Appeal by plaintiff from order entered 21 July 1989 by Judge William H. Freeman in Moore County Superior Court. Heard in the Court of Appeals 11 April 1990.

Plaintiff is the real estate developer of a "residential community" which includes a golf course (hereinafter, "the country club property"). In addition,

plaintiff owns a smaller tract adjoining the country club property upon which plaintiff maintains its place of business (hereinafter, "the office property"). Prior to July 1985, both properties were within the planning and zoning jurisdiction of Moore County. The country club property was zoned for "Residential Development" (RD) which permitted uses such as single and multi-family residences. The office property was zoned for "Business-1" (B-1) which permitted a wide variety of commercial uses.

On 3 June 1985, the North Carolina General Assembly ratified 1985 Session Law 308 which amended General Statute § 160A-360(a) and allowed defendant Village of Pinehurst the right to exercise its zoning and planning powers up to two miles beyond its corporate limits. Defendant published notices in the local newspaper of a public hearing "for the purpose of considering a proposed area for addition to the

extraterritorial zoning jurisdiction of the Village of Pinehurst." Plaintiff was already aware of the area to be included in the extraterritorial jurisdiction of the Village, and knew that its property was to be included and so did not attend the public hearing. On 15 July 1985, the Village Council of defendant adopted an ordinance stating, in part:

> That the area of extra-territorial limits of the Village of Pinehurst shall be amended and extended as shown and delineated on the map prepared by C.H. Blue and Associates, which map is attached hereto, and correspondingly described in exhibit "A" attached hereto and dated July 15, 1985.

Plaintiff alleges that no "Exhibit A" dated July 15, 1985 has ever been found, produced or proven. On 22 July 1985, the Board of Commissioners of Moore County relinquished extraterritorial zoning jurisdiction to defendant. When defendant extended its extraterritorial jurisdiction, it designated plaintiff's country club property

"Public Conservation and Recreation" (PCR) and the office property "Office Professional" (OP). Plaintiff states that it did not learn of the rezoning until June 1986 when two of its representatives "happened to glance at a zoning map fastened to a wall in the office of the manager of the Village."

In January 1987, plaintiff requested that its office tract be rezoned from OP to "Neighborhood Commercial" (NC). Defendant amended its zoning ordinance to subdivide the former NC classification into two new classifications, NC-1 and NC-2 and then rezoned the office property NC-2. The NC-2 designation was less restrictive than OP.

Plaintiff filed a complaint challenging both the 1985 and the 1987 rezonings on state and federal due process grounds. Defendant moved to dismiss the complaint for failure to state a claim for which relief could be granted.

Plaintiff filed a motion for summary judgment. The court granted defendant's motion and denied plaintiff's motion. Plaintiff appeals.

Allen & Pinnix, by Noel L. Allen and Paul C. Ridgeway, for plaintiff-appellant.

Petree Stockton & Robinson, by Penni P. Bradshaw and Robin E. Shea, for defendant-appellee.

LEWIS, Judge.

Plaintiff challenges two zoning actions by defendant, the 1985 zoning of plaintiff's property, and a 1987 rezoning.

I: The 1985 Zoning.

Plaintiff states that a threshold question is the determination of whether a zoning ordinance was indeed enacted. The allegation is based on the purported failure by defendant to file and index properly the map which demonstrated the zoning boundaries in accordance with

the G. S. § 160A-77. Since this question was not raised during the trial and no information regarding this issue is included in the record, it is not properly before this Court.

Plaintiff also asserts that its claim is sufficient to raise a constitutional cause of action so as to invoke a three year statute of limitations instead of the nine-month statute of limitations as provided by G.S. § 160A-364.1 for challenging zoning ordinances. G.S. 160A-364.1 provides:

> A cause of action as to the validity of any zoning ordinance . . . adopted under this Article or other applicable law shall accrue upon adoption of the ordinance . . . and shall be brought within nine months as provided in G.S. 1-54.1.

Plaintiff challenges the validity of the zoning on state constitutional grounds, arguing that the defendant failed to properly notify it of the impending zoning action affecting its property in violation of N.C.G.S. § 160A-364. In fact, defendant's published notice of the zoning action stated that the Village would consider extending its

extraterritorial zoning jurisdiction, and the metes and bounds description included the land owned by appellant. That description put plaintiff on notice that changes would be made affecting its property. See Stutts v. Swaim, 30 N.C. App. 611, 228 S.E.2d 750, disc. rev. denied, 291 N.C. 178, 229 S.E.2d 692 (1976). Moreover, North Carolina case law indicates that the statute quoted above has been strictly construed. Petitioner in In re Appeal of CAMA Permit also alleged that the respondent town had failed to follow proper procedural rules. This Court concluded, however, that "even if the record disclosed that the Town of Bath had violated procedural rules . . ., petitioner is barred from attacking the validity of the amendment based on procedural grounds by the statute of limitations provided in G.S. 160A-364.1. . . ." 82 N.C. App. 32, 41-42, 345 S.E.2d 699, 705 (1986).

Plaintiff characterizes this action as "a cause of

action for deprivation of constitutional rights" and states that the United States Supreme Court in Wilson v. Garcia, 471 U.S. 261, 85 L.Ed. 2d 252 (1985), has directed that such actions "be subject to the relevant state's personal injury statute of limitations" which in North Carolina is three years. The Wilson court was addressing federal civil rights actions under 42 U.S.C.S. § 1983 when it chose to apply the personal injury statute of limitations. We do not find Wilson controlling.

Zoning claims raise important public policy considerations. There is a strong need for finality with respect to zoning matters so that landowners may use their property without fear of a challenge years after zoning has apparently been determined. North Carolina courts have not held that violations of federal constitutional claims in zoning actions extend the usual nine-month statute of limitations. In Sherrill v. Town of Wrightsville Beach, 81

N.C. App. 369, 344 S.E.2d 357, dis. rev. denied, 318 N.C. 417, 349 S.E.2d 600 (1986), this Court held that plaintiff's claims for federal due process violations were barred by the nine-month statute of limitations. It is noteworthy that Sherrill was decided after Wilson, supra.

We hold plaintiff's challenge to the 1985 zoning law based on alleged state and federal constitutional violations is barred by the nine-month statute of limitations. The trial court properly dismissed plaintiff's complaint for failure to state a claim for which relief could be granted.

II: The 1987 Rezoning

Plaintiff contends that its rights were violated by defendant when plaintiff was given a more restrictive zoning than what it requested for its office tract. The rezoning was, however, less restrictive than the original zoning. The rezoning not only allowed the current use to continue but it also permitted even broader uses of

plaintiff's property. Plaintiff made a vague allegation that it "has been damaged in an [sic] yet unascertained amount due to lost opportunities for sale, use and development of the properties." This is speculative and cannot stand. Plaintiff has done nothing to acquire a vested right to a less restrictive zoning and cannot recover speculative damages in an "unascertained amount" due to lost potential opportunities for development of the property. Defendant rezoned the property to allow for the then-current uses and plaintiff has suffered no measurable damages. Plaintiff's allegations are insufficient as a matter of law to state any claim as to the 1987 rezoning and thus were properly dismissed pursuant to Rule 12(b)(6).

AFFIRMED.

Judges ARNOLD and DUNCAN concur.

APPENDIX D

STATE OF NORTH CAROLINA)
)
COUNTY OF MOORE)

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

88 CVS 198

PINEHURST AREA REALTY, INC.,
Plaintiff,

v.

THE VILLAGE OF PINEHURST,
Defendant.

ORDER FOR DISMISSAL OF PLAINTIFF'S CLAIMS ALLOWED AND PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND MOTION TO RECONSIDER DENIED

THIS CAUSE COMING ON TO BE HEARD and being heard before the undersigned Judge Presiding at the February 6, 1989, term of Civil Superior Court, Moore

County, North Carolina, on Defendant Village of Pinehurst's Motion to Dismiss and Plaintiff Pinehurst Area Realty's Motion for Summary Judgment, and thereafter on Plaintiff's Motion to Reconsider;

AND IT APPEARING to the Court, having considered the matters of record, including Plaintiff's Motion to Reconsider, Plaintiff's Response to Supplemental Submissions of Defendant, and Defendant's Response to Plaintiff's Motion to Reconsider, and the briefs, correspondence and oral arguments of counsel for Plaintiff and Defendant, that Plaintiff has failed to state claims for which relief can be granted such that Plaintiff's claims should be dismissed pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure;

AND IT FURTHER APPEARING to the Court that Plaintiff's Motion for Summary Judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure

should be denied;

AND IT FURTHER APPEARING to the Court that Plaintiff's Motion to Reconsider should be denied;

AND IT FURTHER APPEARING to the Court that the parties have consented to this Order being signed after session and out of district;

NOW, THEREFORE, it is ORDERED, ADJUDGED, and DECREED, that Defendant's Motion to Dismiss be and the same is hereby allowed, and Plaintiff's claims hereby dismissed, and further that Plaintiff's Motion for Summary Judgment and Motion to Reconsider are hereby denied.

This the 19th day of July, 1989.

/s/_____
WILLIAM H. FREEMAN
Judge Presiding

APPENDIX E

NORTH CAROLINA)
)
MOORE COUNTY)

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

88 CVS 198

PINEHURST AREA REALTY, INC.,
Plaintiff,

v.

THE VILLAGE OF PINEHURST,
Defendant.

ORDER FOR DISMISSAL OF PLAINTIFF'S CLAIMS ALLOWED AND PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT DENIED

THIS CAUSE COMING ON TO BE HEARD and being heard before the undersigned Judge Presiding at the February 6, 1989 term of Civil Superior Court, Moore County, North Carolina, on Defendant Village of

Pinehurst's Motion to Dismiss and Plaintiff Pinehurst Area Realty's Motion for Summary Judgment;

AND IT APPEARING to the Court, having considered the matters of record and the briefs and oral arguments of counsel for Plaintiff and Defendant, that Plaintiff has failed to state claims for which relief can be granted such that Plaintiff's claims should be dismissed pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure;

AND IT FURTHER APPEARING to the Court that Plaintiff's Motion for Summary Judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure should be denied;

NOW, THEREFORE, it is ORDERED, ADJUDGED, and DECREED that Defendant's Motion to Dismiss be and the same is hereby allowed, and Plaintiff's claims hereby dismissed, and further that

Plaintiff's Motion for Summary Judgment is hereby denied.

This the 23rd day of February, 1989.

/s/ _____
WILLIAM H. FREEMAN
Judge Presiding

APPENDIX F

§ 1-54.1. Nine months.

Within nine months an action contesting the validity of any zoning ordinance or amendment thereto adopted by a county under Part 3 of Article 18 of Chapter 153A of the General Statutes or other applicable law or adopted by a city under Article 160A of the General Statutes or other applicable law.

APPENDIX G

ARTICLE 5.

Limitations, Other than Real Property.

§ 1-52. Three years.

(16) Unless otherwise provided by statute, for personal injury or physical damage to claimant's property, the cause of action, except in causes of actions referred to in G.S. 1-15(c), shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs. Provided that no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action.

APPENDIX H

CHAPTER 308

S.B. 343

AN ACT RELATING TO THE EXERCISE OF EXTRATERRITORIAL PLANNING POWERS BY THE TOWN OF ABERDEEN, THE VILLAGE OF PINEHURST AND THE TOWN OF SOUTHERN PINES IN MOORE COUNTY.

The General Assembly of North Carolina enacts:

Section 1. G.S. 160-A-306(a) is amended by adding a new sentence at the end to read:

"The Town of Aberdeen, the village of Pinehurst and the Town of Southern Pines may exercise the powers granted by this Article for a distance of not more than two miles beyond their corporate limits, without regard to the population limitations of this subsection."

Sec. 2. G.S. 160A-360(f) is amended by adding a new sentence at the end of the first paragraph to read:

"When either the Town of Aberdeen, the Village of

Pinehurst, or the Town of Southern Pines annexes any area outside its corporate limits thus extending the area over which it would be allowed under subsection (a) of this section to exercise the powers granted by this Article, upon presenting proper evidence to the County Board of Commissioners that such annexation has been accomplished, the County Board of Commissioners shall adopt a resolution authorizing said municipality to exercise these powers within the extended area thus described."

Sec. 3. This act is effective upon ratification.

In the General Assembly read three times and ratified, this the 3rd day of June, 1985.

APPENDIX I

The

JULY 22, 1985

MEETING OF THE MOORE COUNTY

BOARD OF COMMISSIONERS

The Moore County Board of Commissioners met in regular session on July 22, 1985 at 6:30 p.m. in the Commissioners Room located on the second floor of the old Courthouse building in Carthage, North Carolina....

H. VILLAGE OF PINEHURST
I. TOWN OF SOUTHERN PINES

The Village of Pinehurst presented a resolution establishing a common boundary between the extraterritorial zoning jurisdiction of the Town of Southern Pines and the Village of Pinehurst and an ordinance providing for the extraterritorial limits of the Village of Pinehurst for purposes of planning and zoning, building inspections and subdivision regulations, both passed by the

Village Council. Also maps were provided by the Village and the Town of Southern Pines determining common boundary lines as previously requested by the Board.

Upon motion made by Commissioner Riley and seconded by Chairman Purvis, the Board voted unanimously to support the resolution to relinquish the extraterritorial zoning jurisdiction to the Village of Pinehurst and the Town of Southern Pines effective July 22, 1985.

Supreme Court, U.S.
FILED
MAY 9 1991
OFFICE OF THE CLERK

No. 90-1619

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

PINEHURST AREA REALTY CO., INC.,
Petitioner,

v.

THE VILLAGE OF PINEHURST,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of North Carolina

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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*Counsel of Record
May 9, 1991

No. 90-1619

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

PINEHURST AREA REALTY CO., INC.,
Petitioner,

v.

THE VILLAGE OF PINEHURST,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of North Carolina

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent, The Village of Pinehurst, respectfully submits that a writ of certiorari to review the judgment of the North Carolina Supreme Court and the opinion of the North Carolina Court of Appeals in this matter is unnecessary and should not issue.

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STATEMENT OF THE CASE[1]

Petitioner, Pinehurst Area Realty, is the developer of Midland Country Club, which in addition to privately-owned residential units includes a golf course and club house owned by Petitioner (the "golf course tract"). Petitioner also owns an adjoining tract upon which both its real estate office and a former filling station are situated (the "office tract"). Petitioner instituted this action challenging certain zoning actions by Respondent, Village of Pinehurst ("the Village"), on state and federal constitutional grounds. Petitioner seeks a Writ of Certiorari based on what it alleges to be federal constitutional questions.

[1]At the outset, Respondent notes that Petitioner has not complied with Rule 29.4(c) of the Rules of the Supreme Court of the United States requiring Petitioner to notify the North Carolina Attorney General that Petitioner is challenging the constitutionality of a statute of the state of North Carolina, which notice is to be accompanied with service of a copy of its Petition on the North Carolina Attorney General. Further, Petitioner has not recited in its Petition that 28 U.S.C. § 2403(b) may be applicable.

1985 Zoning

Both the golf course tract and the office tract are located in Moore County and were originally under the zoning jurisdiction of the County. The County had zoned the country club tract in a zoning district designated RD (Residential). The front 500 feet of the office tract was zoned B-1 (Business) by the County, while the remainder of the office tract was part of the area zoned RD. In June 1985, the North Carolina General Assembly enacted legislation to allow the Village of Pinehurst, the Town of Southern Pines and the Town of Aberdeen to extend their extraterritorial zoning jurisdiction up to two miles beyond their respective corporate limits.

Later that month, pursuant to that delegated authority, the Village of Pinehurst published notice of a public hearing to be held July 8, 1985 to consider a "proposed area for addition to the extraterritorial zoning jurisdiction of the Village." This published notice described the proposed areas by metes and bounds and made reference to the availability of the map showing the proposed zoning. This area proposed to be added to the extraterritorial zoning jurisdiction of the Village included Petitioner's golf course tract

and office tract. After holding the public hearing, the Village extended its extraterritorial zoning jurisdiction and initially placed the office tract in a district designated OP ("Office Professional") while placing the golf course tract in a district designated PCR ("Public Conservation and Recreation"). As Petitioner admits, Petitioner and its representatives "did not attend this public hearing; it was already aware of the area to be included in the extraterritorial jurisdiction of the Village, and knew that its property was to be included." Petition for a Writ of Certiorari at 8.

Petitioner makes much of the fact that the PCR zoning designation "permits only golf courses, riding trails, nature preserves, sewer lift stations, and other non-developed uses." Id. at 10. Petition also laments that the "OP zoning classification permits only limited commercial development such as small professional offices." Id. What Petitioner neglects to point out is that both of these designations permitted ***the existing use of the tracts at the time of the extension of the extraterritorial zoning jurisdiction of the Village***. The PCR tract was already a golf course. The OP tract was already a small professional office. Therefore, although the zoning designations may have been

more restrictive than the Petitioner would have liked, they reflected the existing use of the property.

Petitioner alleges in its Complaint that it did not learn of the zoning classification until June 1986, but Petitioner has admitted that it knew that the property was to be included in the extraterritorial zoning jurisdiction of the Village pursuant to the legislation of the North Carolina General Assembly and subsequent to the public hearing which Petitioner chose not to attend.

The 1987 Rezoning

In January 1987, Petitioner officially requested that its office tract be rezoned from OP to NC ("Neighborhood Commercial"). After several meetings with representatives of Petitioner and after published notice and a public hearing, the Village amended its zoning ordinance to break its former NC classification into two new classifications, NC-1 and NC-2. The Village then rezoned the office tract into a NC-2 district. The NC-2 designation was even less restrictive than OP, and as before, it continued to permit the existing use of the office tract.

Procedural History

In March 1988, Petitioner filed suit, challenging both the initial 1985 zoning and the 1987 rezoning of its office tract on state and federal due process grounds.

The Village moved to dismiss the complaint for failure to state a claim for which relief could be granted. Before the hearing date for this Motion to Dismiss, Petitioner filed a Motion for Summary Judgment. The trial court orally granted Respondent's motion and denied Petitioner's motion. Before the trial court issued a written order, Petitioner filed a Motion for Reconsideration. The trial court denied this motion, and Petitioner filed an appeal which was heard in the North Carolina Court of Appeals. See Pinehurst Area Realty, Inc. v. Village of Pinehurst, 100 N.C. App. 77, 394 S.E.2d 251 (1990).

The North Carolina Court of Appeals affirmed the grant of the motion to dismiss for failure to state a claim upon which relief could be granted and the denial of Petition's Motion for Summary Judgment. The Petitioner then sought review in the North Carolina Supreme Court, but that court denied Petitioner's Petition for Discretionary

Review and dismissed Petitioner's purported appeal as of right upon finding that ***Petitioner did not have any claim based on a constitutional question***. See Pinehurst Area Realty, Inc. v. Village of Pinehurst, 328 N.C. 92, 402 S.E.2d 417 (1991).

Petitioner now seeks review of this 1985 legislative decision by the Village Council of the Village of Pinehurst in this honorable Court. Respondent respectfully submits that this Court should deny Petitioner's Petition for a Writ of Certiorari.

SUMMARY OF RESPONDENT'S ARGUMENT

This dispute involving legislative decisions of the Village Council of Respondent does not present the type of question or questions worthy of the resources of this honorable Court for several reasons.

Petitioner's claims as to the office tract have been rendered moot by subsequent legislative decisions of the Village Council.

The arguments raised by Petitioner's questions presented to this Court in its Petition for a Writ of Certiorari involve attempts to turn alleged state procedural deficiencies into federal constitutional questions.

Even if Petitioner's legal gymnastics do present federal constitutional questions, review by this Court would be unwarranted because there are ***independent state grounds*** which support the trial court's decision to grant a motion to dismiss regardless of the resolution of the purported federal

constitutional questions which Petitioner seeks to have reviewed in this Court.

Further, review by this Court would be futile in that Petitioner seeks to undo a legislative decision which could properly be remade through another zoning ordinance by the Village Council; if Petitioner would like a different zoning classification for its property, Petitioner may proceed through the appropriate legislative channels to seek to have the property rezoned, so Petitioner is not without recourse.

Furthermore, this case is not appropriate for Supreme Court review because Petitioner has no property interest in the zoning designation which would entitle it to federal due process. Petitioner could not have any realistic expectation that its property would never have been rezoned as it is clear that the state legislature has delegated to cities the authority to zone and rezone property.

It is also clear that even if Petitioner were entitled to due process, Petitioner received all of the notice that it was due because the notice which is given need only be sufficient to put a property owner on notice that changes will be made effecting his property.

Finally, Petitioner does not have a viable taking claim because the zoning regulation has not precluded Petitioner from all economic opportunities with respect to the property, nor has the zoning resulted in a permanent physical occupation of the property.

ARGUMENT

Mootness

The claim brought by Petitioner with regard to the initial 1985 zoning of the office tract was appropriately dismissed because Petitioner's dispute in connection with that rezoning is moot. The Village properly rezoned that tract NC-2 in 1987 as it had authority to do so under state zoning statutes, and thus Petitioner as a matter of law no longer has any cognizable claim based on the 1985 zoning of the office tract. In Johansen v. City of Bartlesville, 862 F.2d 423 (10th Cir. 1988), defendant city rezoned property allegedly in violation of state notice requirements. Plaintiffs' suit was dismissed. Pending appeal, the city rescheduled the zoning matter for hearing and gave proper notice to all parties. After the hearing, the city voted to adopt the disputed zoning. The court held that the second hearing, which corrected the procedural defects allegedly presented in the first hearing, rendered plaintiffs' claims moot.

Respondent submits that the 1985 zoning amendment was free of procedural defects; however, even if this Court were to hold otherwise, the subsequent rezoning of the office tract into an NC-2 district rendered moot any claims as to defects which might have been present in the 1985 zoning. Thus, on these grounds, Petitioner's challenge to the 1985 zoning of the office tract was properly dismissed.

In its complaint, Petitioner purported to challenge the 1987 rezoning as well. Petitioner's Complaint was filed within nine months of the adoption of the 1987 zoning amendment affecting Petitioner's land. The trial court's grant of Respondent's motion to dismiss and the opinion of the North Carolina Court of Appeals make clear that this portion of Petitioner's claim was dismissed for the failure to state a claim for which relief could be granted, not based on any statute of limitations. Further, Petitioner's questions presented to this Court concern the 1985 zoning and not the 1987 rezoning. Thus, the only remaining challenge would appear to be in regards to the country club tract zoning of 1985.

State Court Decision Supportable On Grounds Other Than Statute of Limitations

In its second question presented, Petitioner appears to argue that its property interest in a cause of action was denied without due process of law by the application of a nine-month statute of limitations to its claims. The North Carolina Court of Appeals, however, in its opinion clearly stated that the notice was sufficient, so Petitioner's claims were ***considered and resolved on grounds other than the application of the statute of limitations.*** As the North Carolina Court of Appeals stated:

> Plaintiff challenges the validity of the zoning on state constitutional grounds, arguing that the defendant failed to properly notify it of the impending zoning action affecting its property in violation of N.C.G.S. § 160A-364. In fact, defendant's published notice of the zoning action stated that the Village would consider extending its extraterritorial zoning jurisdiction, and the metes and bounds description included the land owned by appellant. That description put plaintiff on notice that changes would be made affecting its property.

100 N.C. App. at 80, 394 S.E.2d at 253.

Petitioner Had Adequate Notice

In fact, in its petition to this Court, Petitioner admits that it had notice of the July 8, 1985 public hearing concerning the extraterritorial zoning jurisdiction of the Village -- "PAR did not attend this public hearing; it was already aware of the area to be included in the extra-territorial jurisdiction of the Village, and it knew that its property was to be included." Petition for Writ of Certiorari at 8.

Futility of Supreme Court Review

Consideration of the questions allegedly presented by this case by this honorable Court is also unwarranted in that such consideration would be futile. Even though Respondent asserts that Petitioner received adequate notice of the zoning hearing, Petitioner challenges the procedure by which this legislative decision was made. Even if Petitioner should ultimately prevail in this action, Respondent could initiate rezoning proceedings and rezone the property pursuant to legislative authority delegated to it. In fact, were Respondent to pursue rezoning the country club tract at this time, Respondent would send notice to Petitioner by

first-class mail not only because such a practice would be prudent after such protracted litigation, but also because the North Carolina General Assembly amended the statutes regarding zoning procedures for all such zoning amendments after October 1, 1985. See 1985 N.C. Sess. Laws Ch. 595 (App. p. 7). The statutes, thus, now require that notice be mailed to landowners such as Petitioner. See N.C. Gen. Stat. § 160A-384. Furthermore, Petitioner is not without recourse aside from this litigation because Petitioner may seek to have its property rezoned at any time by pursuing rezoning procedures in the legislative branch of government.

Full Authority To Zone

Petitioner asserts that the Village "had no authority to enact the ordinance it claims to have enacted [because] the County and General Assembly of North Carolina did not delegate power to the Village of Pinehurst to zone that territory until seven days after the ordinance was allegedly adopted." Petition for Writ of Certiorari at 19-20. This argument misconstrues both the legislation passed by the General Assembly and the ordinance passed by the Village Council.

The Act Relating to Extraterritorial Zoning Jurisdiction of the Village of Pinehurst passed by the General Assembly provides that "the Village of Pinehurst . . . may exercise the powers granted by this Article for a distance of not more than two miles beyond [its] corporate limits, without regard to the population limitations of this subsection." 1985 N.C. Sess. Laws Ch. 308, s.1 (App. p. 1) (emphasis added). There are no conditions to this authority.

The reference to approval by the Moore County Board of Commissioners in Section 2 of this Act relates to the assertion of extraterritorial zoning authority into areas previously zoned by Moore County after annexation proceedings by the Village of Pinehurst. Such approval was not required before exercising extraterritorial zoning authority in the two miles beyond the corporate limits of Pinehurst as they existed at the time of enactment of the legislation. Thus, the approval granted by the Moore County Board of Commissioners on July 22, 1985 was not necessary for the office tract or the country club tract.

At any rate, the Ordinance Providing for the Extraterritorial Limits of the Village of Pinehurst attached as Exhibit D to Petitioner's Complaint, the applicable

ordinance passed by the Village Council, provided that "[t]his ordinance shall be deemed to be in full force and effect from and after the 15th day of July, 1985 and approval by the Moore County Board of Commissioners for those areas where such approval is required." (App. p. 3) (emphasis added). Thus, even if such approval was required, the ordinance provided on its face that it would not be effective until after that approval was granted.

No Federal Constitutional Claim

While Respondent suggests that this Court should not grant Petitioner's Petition for a Writ of Certiorari because of the mootness, futility, and the lack of a significant federal question, Respondent further asserts that this Court would not even have to address the issue of the proper statute of limitations in a zoning case involving a federal constitutional question because ***Petitioner has failed to state a claim under federal constitutional law***. The North Carolina Supreme Court determined that Petitioner's claims involved no substantial question arising under either the state or federal constitutions when it granted Respondent's motion to dismiss Petitioner's appeal asserted to be an appeal as of

right based on a constitutional question. See 328 N.C. 92, 402 S.E.2d 417 (1991) (reprinted as Appendix A, App. pp. 1-2, of Petitioner's Petition for Writ of Certiorari).

To have a property interest protected by the federal Constitution, a person must have more than an ownership interest in the property; he must have a legitimate claim of entitlement. See Board of Regents v. Roth, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). This entitlement must arise from an independent source, either by contract or by state law. Under North Carolina law, Petitioner had no entitlement to keep the zoning designation established by Moore County before the Village's exercise of its extra-territorial zoning jurisdiction. See N.C. Gen. Stat. § 160A-381 (1987) (granting cities the authority to regulate usage, density and location through zoning). Petitioner's Complaint alleges no facts that would give it a constitutionally protected property interest in the zoning designation that it had under Moore County's zoning authority. See Jackson Court Condominiums, Inc. v. City of New Orleans, 665 F. Supp. 1235, 1243 (E.D. La. 1987); Keiger v. Board of Adjustment, 281 N.C. 715, 190 S.E.2d 175 (1972) (a property owner has no right to a particular type of zoning designation until it (1) acquires building permits and (2) makes

substantial expenditures in good faith reliance on the existing zoning ordinance).

Not Subject To Federal Due Process Requirements

Moreover, zoning decisions as a matter of law are not subject to federal due process requirements. North Carolina courts have repeatedly characterized zoning as a legislative action, rather than a judicial action. See, e.g., Allred v. City of Raleigh, 277 N.C. 530, 178 S.E.2d 432 (1971); Zopfi v. City of Wilmington, 273 N.C. 430, 160 S.E.2d 325 (1968); Sherrill v. Town of Wrightsville Beach, 81 N.C. App. 369, 344 S.E.2d 357, disc. rev. denied, 318 N.C. 417, 349 S.E.2d 600 (1986); see also Shelton v. City of College Station, 780 F.2d 475 (5th Cir.), cert. denied, 477 U.S. 905, 106 S. Ct. 3276, 91 L. Ed. 2d 566 (1986) (local zoning actions are considered legislative actions for purposes of due process under the federal constitution); Q.C. Const. Co. v. Gallo, 649 F. Supp. 1331 (D.R.I. 1986) (lack of notice and hearing; no due process claim because zoning is a legislative act). A violation of state law is not necessarily a constitutional violation. See, e.g., Smith v. City of Picayune, 794 F.2d 482 (5th Cir. 1986); Jackson Court Condominiums, Inc. v. City of New Orleans, 665 F. Supp. 1235 (E.D. La. 1987); Dean

Tarry Corp. v. Friedlander, 650 F. Supp. 544 (S.D.N.Y.), aff'd, 826 F.2d 210 (2d Cir. 1987).

Even if Petitioner did have a protected property interest in the Moore County zoning designation, which Respondent firmly denies, ***local zoning decisions are not subject to federal procedural due process requirements***. The United States Supreme Court made it clear in Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441, 36 S. Ct. 141, 60 L. Ed. 372 (1950), that a deprivation of property that is a result of a legislative enactment is not subject to federal procedural requirements of due process:

> Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption. The constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected the only way that they can be in complex society by their power, immediate or remote, over those who make the rule. . . . There must be a limit to individual government in such matters if the government is to go on.

Id. at 445, 35 S. Ct. at 142, 60 L. Ed. at 375. Such is the case here. This was a legislative decision involving a large expanse of land, not just Petitioner's tract. Notice was given to the whole community, and many people attended the public hearing. This legislative decision affected a large number of people. It was not a decision targeted at Petitioner.

Proper Notice Was Given

Further, Respondent asserts that even if Petitioner was entitled to due process under the federal Constitution with respect to the 1985 zoning by the Village, Petitioner received the required notice and an opportunity to be heard. The published notice stated that the Village would meet to extend its extraterritorial zoning jurisdiction, and the metes and bounds description included the land owned by Petitioner. To be adequate, notice of a zoning action need not describe precisely what will take place at the hearing; it is enough that the description would put a property owner on notice that changes will be made affecting his property. See, e.g., Walker v. Town of Elkin, 254 N.C. 85, 118 S.E.2d 1 (1961); Stutts v. Swaim, 30 N.C. App. 611, 228 S.E.2d 750, disc. rev. denied, 291 N.C. 178, 229 S.E.2d 692 (1976). The

North Carolina Supreme Court has explained what notice is sufficient in zoning cases:

> Ordinarily, if the ordinance or amendment as finally adopted contains alterations substantially different (amounting to a new proposal) from those originally advertised and heard, there must be additional notice and opportunity for additional hearing. However, no further notice or hearing is required after a properly advertised and properly conducted public hearing when the alteration of the initial proposal is insubstantial. . . . Moreover, additional notice and public hearing ordinarily will not be required when the initial notice is broad enough to indicate the possibility of substantial change and substantial changes are made of the same fundamental character as contained in the notice, such changes resulting from objections, debate and discussion at the properly noticed initial hearing.

Heaton v. City of Charlotte, 277 N.C. 506, 518, 178 S.E.2d 352, 359-60 (1971), quoted in In re Application of Raynor, 94 N.C. App. 91, 97, 379 S.E.2d 880, disc. rev. denied, 325 N.C. 707, 388 S.E.2d 448 (1989).

Under this standard, the notice provided by Respondent was adequate. Petitioner admits knowing about this public hearing. Further, the minutes of this public

hearing make clear that other property owners similarly situated to Petitioner understood that new zoning designations would be discussed along with the extension of the extraterritorial zoning jurisdiction of Respondent because various citizens rendered their opinion on the various zoning designations. (App. p. 9; portions of these minutes were attached as an exhibit to Plaintiff's Complaint).

Even if this notice was insufficient, it is North Carolina state statutes that impose a notice requirement. See N.C. Gen. Stat. §§ 160A-364 & -384 (1987). It is well-established that "the mere failure to follow state law procedures will not support a claim under the United States Constitution." Jackson Court Condominiums, Inc. v. City of New Orleans, 665 F. Supp. 1235, 1248 (E.D. La. 1987). It is axiomatic that not every violation of the state's statute amounts to an infringement of a constitutional right . . . and courts have repeatedly rejected similar attempts to create a constitutional question out of a state law violation in the land use area. Dean Tarry Corp. v. Friedlander, 650 F. Supp. 551, 554 (S.D.N.Y.), aff'd, 826 F.2d 210 (2d Cir. 1987).

No Taking Claim

Petitioner also seeks to turn this case into a taking question. See Petition for Writ of Certiorari at 22-26. However, ***the zoning decision in this case clearly does not rise to the level of a taking.*** In its Petition for a Writ of Certiorari, Petitioner admits that the PCR District, the zoning designation given to the golf course tract, permits "golf courses, riding trails, nature preserves, sewer lift stations, and other non-developed uses." Petition at 10. As such, it permits the exact use established by Petitioner. Although North Carolina has an established doctrine of nonconforming uses, Petitioner need not even take advantage of that doctrine because its use from 1985 through the present continues to be that of a golf course, a permitted use under both the Moore County and Village of Pinehurst zoning classifications. Petitioner has not been denied the opportunity to make economically viable use of the property.

Petitioner relies on what it deems to be an "analogous" case -- Fred F. French Investment Co. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381 (1976), cited in

Petition for Writ of Certiorari at 26. However, that case was decided before the United States Supreme Court's decision in Penn Central Transportation Co. v. New York City, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978), in which this Court held that a zoning regulation does not give rise to a taking when the landowner still has legally permissible uses which provide an opportunity for the landowner to obtain a "reasonable return" on its investment. Id. at 136, 98 S. Ct. at 2665, 57 L. Ed. 2d at 656; see also Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414-15, 43 S. Ct. 158, 67 L. Ed. 322 (1922).

Further, Petitioner has not alleged a permanent physical occupation of the property which would amount to a taking. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982). "It is insufficient for plaintiff to show only that the regulation deprives him of the best use of his property or that the regulation has caused a severe decrease in the value of his property." Goldblatt v. Town of Hempstead, 369 U.S. 590, 592, 82 S. Ct. 987, 8 L. Ed. 2d 130 (1962).

Need For Finality On Public Policy Grounds

In the final analysis, Petitioner seeks to have a three-year statute of limitations apply to all zoning decisions. Policy reasons mitigate against such a statute of limitations. In the usual tort situation, there is not the same need for finality that is present in a zoning situation. A three-year statute of limitations, although inconvenient, does not prevent potential defendants in tort actions from going forward with their plans. In contrast, a three-year statute of limitations for zoning challenges would effectively paralyze not only the defendant municipality, but also homeowners, businesses, developers, and other interested persons. It would be foolish to take any action with respect to a newly-zoned piece of property until three years had elapsed and the party could be sure that the zoning decision was safe from challenge.

The strong need for finality with respect to zoning matters supports a policy of limiting the time period in which challenges to zoning may be brought. Moreover, if the three-year statute of limitations were applied to "federal" challenges to zoning ordinances, the nine-month period provided by North Carolina statute would become a nullity.

Every plaintiff who sought to challenge an ordinance could merely add some allegation that his "federal constitutional rights" had been violated and thereby be given an additional two years and three months within which to file his complaint.

It should be pointed out that the statute of limitations for zoning decisions never really runs out in that a landowner may always seek to have his property rezoned by the county or municipality through the regular legislative process. Zoning decisions are thus not similar to termination of creditors rights in probate proceedings analyzed in Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478 (1987), on which Petitioner seeks to rely. A creditor in the Oklahoma probate court, unlike a North Carolina landowner, was forever barred from bringing a claim against the estate of a decedent if not brought within two months after publication of notice to creditors. The Oklahoma executor sought to rely on published notice to begin the two-month period, and it was the sufficiency of that notice which was at issue. In this case, any statute of limitations which does begin to run commences with the zoning decision and not with the issuance of notice. And, at no time is a North

Carolina landowner barred from seeking rezoning of his property.

CONCLUSION

State procedural matters and legislative decisions such as zoning matters do not lend themselves to questions worthy of the resources of this Court for review of significant federal constitutional questions. Although Petitioner asserts that various Fifth and Fourteenth Amendment rights have been deprived without due process of law, it is clear that much of the dispute has been rendered moot by subsequent rezoning decisions and that consideration of the remaining questions would be futile because of their legislative nature.

Petitioner has not presented a colorable taking claim because Petitioner still has substantial economic opportunities; indeed, Petitioner still may legally make use of the property in the original manner in which it chose to develop the property under the Moore County zoning

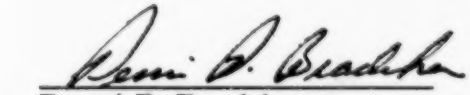
designation which is substantially similar to the current Pinehurst zoning designation.

Although there are multiple reasons which support the trial court's decision to grant Respondent's motion to dismiss the complaint for failure to state a claim, Petitioner basically argues that his cause of action has been unconstitutionally deprived by a statute of limitations which bars his claim. However, Petitioner is not without recourse as the original decision complained of was a legislative decision which may be reversed through the regular channels of the legislative branch of government at any time.

Finally, as is clear from a review of the questions presented, this petition for writ of certiorari does not raise the sort of "important question of federal law which has not been, but should be, settled by this Court," nor has Petitioner shown that this decision of the North Carolina Court of Appeals "has decided a federal question in a way that conflicts with the decision of another state court of last resort." Rules of the Supreme Court of the United States Rule 10.1.

For the foregoing reasons, Respondent urges this Court to deny Petitioner's petition for a writ of certiorari.

Respectfully submitted, this the 9th day of May, 1991.



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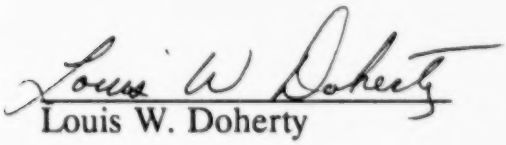

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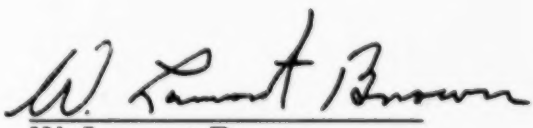

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APPENDIX A

CHAPTER 308

S.B. 343

AN ACT RELATING TO THE EXERCISE OF EXTRATERRITORIAL PLANNING POWERS BY THE TOWN OF ABERDEEN, THE VILLAGE OF PINEHURST AND THE TOWN OF SOUTHERN PINES IN MOORE COUNTY.

The General Assembly of North Carolina enacts:

Section 1. G.S. 160A-360(a) is amended by adding a new sentence at the end to read:

"The Town of Aberdeen, the village of Pinehurst and the Town of Southern Pines may exercise the powers granted by this Article for a distance of not more than two miles beyond their corporate limits, without regard to the population limitations of this subsection."

Sec. 2. G.S. 160A-360(f) is amended by adding a new sentence at the end of the first paragraph to read:

"When either the Town of Aberdeen, the Village of Pinehurst, or the Town of Southern Pines annexes any area outside its corporate limits thus extending the area over which it would be allowed under subsection (a) of this section to exercise the powers granted by this Article, upon presenting proper evidence to the County Board of Commissioners that such annexation has been accomplished, the County Board of Commissioners shall adopt a resolution authorizing said municipality to exercise these powers within the extended area thus described."

Sec. 3. This act is effective upon ratification.

In the General Assembly read three times and ratified, this the 3rd day of June, 1985.

APPENDIX B

AN ORDINANCE PROVIDING FOR THE EXTRATERRITORIAL LIMITS OF THE VILLAGE OF PINEHURST FOR PURPOSES OF PLANNING AND ZONING, BUILDING INSPECTIONS AND SUBDIVISION REGULATIONS

BE IT ORDAINED AND ESTABLISHED by the Village Council of the Village of Pinehurst, Moore County, North Carolina, in regular session assembled on July 15, 1985, pursuant to General Statutes 160A-360 as follows:

SECTION 1. That the area of extraterritorial limits of the Village of Pinehurst shall be amended and extended as shown and delineated on the map prepared by C. H. Blue and Associates, which map is attached hereto, and correspondingly described in Exhibit "A" attached hereto and dated July 15, 1985.

SECTION 2. That the jurisdiction and authority of the Pinehurst Village Council for all purposes including adopting and enforcing zoning regulations, subdivision control regulations, and the enforcement of the North Carolina State Building Code, be extended to include the extraterritorial area defined in Section 1 hereof.

SECTION 3. This Ordinance shall be deemed to be in full force and effect from and after the 15th day of July, 1985 and approval by the Moore County Board of Commissioners for those areas where such approval is required.

Adopted this 15th day of July, 1985.

VILLAGE OF PINEHURST
VILLAGE COUNCIL

(Municipal Seal)

ATTEST:

By:/s/Edgar J. Roberts
Edgar J. Roberts, Mayor

/s/Melodie F. Frye
Melodie F. Frye, Village Clerk

Approved as to form:

/s/W. Lamont Brown
W. Lamont Brown, Village Attorney

APPENDIX C

LEGAL NOTICE

NOTICE OF PUBLIC HEARING.

VILLAGE OF PINEHURST.

NOTICE IS HEREBY GIVEN that a Public Hearing will be held by the Village Council of the Village of Pinehurst, North Carolina on Monday, July 8, 1985 at 4:00 p.m. in the World Golf Hall of Fame Auditorium, Pinehurst, North Carolina for the purpose of considering a proposed area for addition to the extraterritorial zoning jurisdiction of the Village of Pinehurst, North Carolina.

The boundaries of such area are defined as follows:

Proposed area for addition to extraterritorial zoning for the Village of Pinehurst, N.C.

Beginning at the intersection of .... [what follows is the metes and bound description].

A map showing the proposed area to be added to the extraterritorial zoning jurisdiction is on file and may be

inspected in the Office of the Village Clerk on Chinquapin Road, Pinehurst, North Carolina, between the hours of 8:30 a.m. and 5:00 p.m., Monday through Friday. All persons interested and wishing to be heard should be present in order that their opinions may be made a matter of record. A citizen may be present in person or represented by his authorized agent. If unable to be present, a citizen or his authorized agent may record his views by letter or memorandum delivered to the Village Clerk forty-eight (48) hours prior to the scheduled hearing.

Signed Melody F. Frye
Village Clerk
6:26, 7:3

APPENDIX D

CHAPTER 595 Session Laws - 1985

S.B. 469 **CHAPTER 595**

AN ACT TO REQUIRE THAT ZONING PROCEDURES INCLUDE A NOTICE REQUIREMENT.

The General Assembly of North Carolina enacts:

Section 1. G.S. 153A-343 is amended by adding a new sentence to read:

"The procedures adopted pursuant to this section shall provide that whenever there is a zoning classification action involving a parcel of land, the owner of that parcel of land as shown on the county tax listing, and the owners of all parcels of land abutting that parcel of land as shown on the county tax listing, shall be mailed a notice of the proposed classification by first class mail at the last addresses listed for such owners on the county tax abstracts. The person or persons mailing such notices shall certify to the Board of Commissioners that fact, and such certificate shall be deemed conclusive in the absence of fraud."

Sec. 2. G.S. 160A-384 is amended by adding a new sentence to read:

"The procedures adopted pursuant to this section shall provide that whenever there is a zoning classification action involving a parcel of land, the owners of all parcels of land abutting that parcel of land as shown on the county tax listing, shall be mailed a notice of the proposed classification by first class mail at the last addresses listed for such owners on the county tax abstracts. The person or persons mailing such notices shall certify to the City Council that fact, and such certificate shall be deemed conclusive in the absence of fraud."

Sec. 3. This act shall become effective October 1, 1985 and shall apply only when tax maps are available for the areas to be zoned.

In the General Assembly read three times and ratified, this the 4th day of July, 1985.

APPENDIX E

MINUTES OF THE PINEHURST VILLAGE COUNCIL

PUBLIC HEARING

July 8, 1985

The Pinehurst Village Council held a Public Hearing on Monday, July 8, 1985 at 4:00 p.m. in the World Golf Hall of Fame Auditorium for the purpose of considering (1) an amendment to the Zoning Ordinance to add to Section 4.1 R-SMF-4 and change R-SMF to R-SMF-6 and to change heading in 5.6 to "R-SMF-4 - Residential Single and Multi-Family District" and * * * ; (2) a request to rezone the Mystic Cottage, Lots 901, Old Town, from R-10 to OP-Office Professional; (3) a proposed area for addition to the extraterritorial zoning jurisdiction of the Village of Pinehurst, North Carolina. Those in attendance were:

Mr. Edgar J. Roberts, Mayor
Mr. Charles A. Grant, Mayor Protem
Mr. Ray E. Graichen, Treasurer
Mr. J. Ellis Fields, Jr.
Mrs. Marjorie S. Heller
Mr. George A. Wood, Village Manager
Mrs. Nancy Donahue, Planning and Zoning Board

Mrs. Melodie S. Frye, Village Clerk
and 35 people in the audience.

Absent:

Mr. W. Lamont Brown, Village Attorney

Mayor Roberts called the Public Hearing to order and advise that the Legal Notice had been published in The Pilot on June 26, 1985 and July 3, 1985.

Mayor Roberts asked the Village Clerk if she had received any written communication regarding any matter for the Public Hearing.

Mrs. Melodie Frye, Village Clerk, stated she had received only one letter, which she then read into the record. The letter from Harris Blake, dated July 8, 1985 is included as part of this record and is in the Minutes' Files.

* * *

[Discussion of the zoning ordinance amendments R-SMF-4 District and discussion of the rezoning of Mystic Cottage from R-10 to OP.]

Mayor Roberts opened the floor for discussion of the proposed area to be included in the extraterritorial zoning jurisdiction.

Counsel member Grant stated, "because there has been some confusion of articles in the press I would like to go through the zoning process. There has been a sense that the Village imposes zoning on people, actually it comes the other way. You are the ones that decide how you want property zoned. What has happened to date is that our Planning and Zoning Board has gone through and established what most of the uses are in the area concerned. We have not only covered the area that has recently been annexed, but the other area which will be part of our extraterritorial relief from the County. Part of this we have included in the Public Hearing, but Mrs. Louis Meyer's farm will go to Southern Pines. We have agreed with them that this line will come up along this point (he pointed on map). We included this piece of property in the Public Hearing Notice because you can go back from this line, but you cannot go up from it. The other pieces of property are ones Planning and Zoning Board have gone through and made recommendations for zoning. Now we have a Public Hearing and hear from you as to whether you agree with

the Planning and Zoning Board or have some objection to it. Following that we will try to weigh the balances of the various opinions about these pieces of property and proceed to establish the zoning from the Village which can be appealed either to the Board Adjustment or beyond to the Village Council. It is not anything that is imposed upon you. Everybody has a voice in it and then we will have opportunity to make some decision based on what we feel the strongest public opinion is about the area in question."

* * *

Mr. George Davis, of Midland Road, speaking as Chairman of Moore County Citizens for Better Zoning stated, "Back in July 1983, we presented a petition with 149 signatures of actual people who resided in this area we are talking about now, including the #6 Golf Course. All of these people favored to have zoning picked by Pinehurst for a distance of 1.3 miles which would go out to Dr. Neill Road and would take in all of #6 Golf Course. At that time, the State Law permitted only one mile extension by a municipality of less than 10,000 people, so we were stopped there. As you know, this process has been going for a whole year now. We have had many ups and downs. I think today is a real

joyful day because at last we have reached a point where it looks like the dye is cast and a decision will be made. I want you to know that the people in this area by a large majority are in favor of what you are about to do. During this process, of course, we have had legislative approval to go 2 miles which enables Aberdeen, Southern Pines and Pinehurst to agree upon a line of demarcation where the 2 miles overlap. We feel like this is a good step forth which will enable our area to zone the area in a manner compatible with the character of Pinehurst. We are opposed to high density developments. We realize that some of this property has been zoned under the County, prior to this point which makes it impossible for you to do anything about changing property that has already been platted. We feel like this will enable Pinehurst to protect us and maintain a desirable low density area. I want to compliment you and all the members of the Village Council and Mr. Wood who have been very supportive and worked closely with us and the Towns of Southern Pines and Aberdeen. I want to congratulate you on behalf of the organization."

* * *

[Mr. Harris Blake presented his proposals for some multi-family units and the zoning classification required for such a development.]

Mr. George Davis stated that what disturbs him is that there are 241 units on the northeast side of the traffic circle, Pinehurst Trace and 120 units on the southeast side of the Circle, Pinehurst Manor and across Midland Road from Mr. Blake's proposed project, Mr. Frank Maser proposes 38 units. He stated that from the standpoint of traffic eventually there will be one bad situation around the circle. He stated that these properties are already platted and he doesn't know what Pinehurst can do about it but it concerns him and a lot of people around the area.

Mrs. Stevie Edwards stated that she does not see how Mr. Blake can feel comfortable with the proposal unless he has the backing of the people surrounding the tract.

Mr. Blake stated that he respects his neighbors on this and he doesn't feel that when it is all over he will have enemies based on the project.

Mr. Larry Lyerly expressed concern over density if the property is zoned for multi-family and also expressed concern over the number of people and automobiles such a development would bring.

Mr. Carl Moser stated that he is sure that whatever Mr. Blake would do would enhance Pinehurst, but we do not know that Mr. Blake is always going to own the property. He stated that with the people sitting behind the property being zoned R-30 he does not see how the zoning could go below R-20. He stated that when multi-family housing goes in next to single family dwellings, the single family homes' value decreases.

* * *

There being no further discussion, the meeting adjourned at 4:58 p.m. upon motion of Council member Grant, duly seconded by Council member Fields and carried.

Respectfully submitted,

/s/Melodie F. Frye
Melodie F. Frye, Village Clerk